SUPREME COURT U. S.

FILED

JUN 17 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Appellants,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a three judge court of the United States District Court for the Eastern District of New York (Circuit Judge Moore, District Judges Mishler and Weinstein), entered on May 12, 1969 dismissing plaintiffs' claim under the Equal Protection Clause of the United States Constitution, dissolving the three judge court, and remanding the case to the single

district judge and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The order and opinion of the three judge court of the District Court for the Eastern District of New York is not yet reported. It is set forth in the Appendix (10a). The order and opinion of the Hon. Jack Weinstein, District Judge, convening the three judge court is not reported. It is set forth in the Appendix (4a).

Jurisdiction

This suit was brought under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331, 1343, 2201 and 2202 seeking declaratory and injunctive relief against a state statute of state-wide applicability on the grounds that it violated the equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the District Court was entered May 12, 1969 and rehearing was denied June 6, 1969. Notice of appeal was filed in that court on June 12, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b) and has been sustained by the following decisions. *Snell* v. *Wyman,* 393 U.S. 323 (1969); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 75 (1960); *United States* v. *Georgia Public Social Services Commission,* 371 U.S. 285, 287 (1963); *American Federation of Labor* v. *Watson,* 327 U.S. 582, 591 (1945).

Questions Presented

This suit affects 850,000 recipients of AFDC, involves some 10 million dollars per month, and a profound federal interest in compliance with paramount federal law. It was brought on April 9, 1969 under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 and 1331 to enjoin, prior to July 1, 1969, the implementation of a New York Statute setting forth standards of assistance for Aid to Families with Dependent Children which reduced substantially the grants paid in New York City and reduced even further the grants paid in other areas of the State on the grounds (1) that the statute violated 42 U.S.C. § 602(a)(23), the federal Social Security Act, (2) that the discrimination against residents outside New York City violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was quickly convened and found that it had been properly convened under 28 U.S.C. §§ 2281 and 2284 on the authority of *King* v. *Smith,* 392 U.S. 309 (1968). After submission of extensive evidence and briefing and final argument on both claims on cross motions for summary judgment before the three-judge court, the Respondent secured a discretionary administrative power on May 9, 1969 to correct the geographical discrimination on which the constitutional claim was based. The three-judge court thereupon immediately (May 12) dissolved itself, because of this unexercised administrative discretion, stating that the constitutional claim was now moot or unripe and that petitioners had failed to exhaust and remanded the balance of case to the single district judge for appropriate proceedings.

(1) Did the District Court properly dismiss this constitutional claim under 42 U.S.C. 1983 and 28 U.S.C. 1343(3)

because the petitioners had failed to exhaust possible state court mandamus remedies to correct the discrimination against Nassau County residents mandated by the terms of the state statute?

(2) Did the District Court properly find that where a self-executing state statute mandates a discriminatory result found to present a substantial constitutional question, the question becomes "moot" or "unripe" when an administrator is given a wholly-discretionary power of dispensation, then and now unexercised, to prevent the unconstitutional result otherwise required?

(3) Where the jurisdiction-conferring constitutional claim was deemed moot and unripe after final submission of evidence and final argument on cross motions for summary judgment, did the three-judge District Court err in declining to decide the pendent and dispositive federal statutory claim and thereby imply federal jurisdiction over the pendent claim had been extinguished where all parties agreed and the federal interest dictated that a prompt final decision was critical?

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves the Social Security Act, 42 U.S.C. 602(a)(1) and (23).

This case also involves 28 U.S.C. §§ 2281, 1343(3) and (4) and 42 U.S.C. § 1983.

Finally this case involves New York Social Services Law Section 131-a, L. 1969, ch. 84, as amended.

These statutes are set forth in the petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed herewith.

Statement of the Case

The Statement of the Case is set forth in the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit filed herewith.

The Questions Are Substantial

Jurisdiction should be noted because substantial questions are raised by the dissolution of the three-judge court and dismissal of the constitutional claim and because in the posture of this case only this Court can afford full appellate review of federal court jurisdiction over the pendent and dispositive federal statutory claim.

Whether 28 U.S.C. §2281 required a three-judge court to hear both the constitutional and federal statutory claim was explored in depth at the outset of the suit along with the jurisdictional base of 42 U.S.C. §1983 and 28 U.S.C. § 1343, as applied in *King* v. *Smith,* 392 U.S. 309 (1968). Judge Weinstein ruled that Appellants presented a substantial constitutional attack on a statute of statewide applicability which under § 2281 must be heard by a three-judge panel and that federal courts assuredly have jurisdiction over this constitutional claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, however narrowly construed, without regard to amount in controversy. *King* v. *Smith, supra; Shapiro* v. *Thompson,* —— U.S. —— (1969). The same

provisions provided jurisdiction for the Social Security Act claim, which was plainly pendant to the constitutional attack on the same state law, *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *King* v. *Smith, supra.* Judge Weinstein further ruled that in accordance with the traditional rule the pendant claim should also be heard by the three-judge court particularly since "a three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case, so that uncertainty may be eliminated as soon as possible" (7a).

Chief Judge Lumbard designated a panel to hear the case and all of the jurisdictional and substantive issues were briefed and submitted to the three-judge panel. That court affirmed *per curiam* that this was a case required to be heard by the three judges in its express holding under 28 U.S.C. §2281 that "a three-judge court was properly convened in this case" (10a), but thereupon dismissed *sua sponte* the constitutional claim as now moot and unripe (12a). Because the constitutional claim was supposedly moot or unripe, the three-judge court declined to decide the federal statutory claim and remanded the case to the initial single district judge for appropriate proceedings.

This dismissal is obviously improper. A constitutional challenge is not unripe where a self-executing statute dictates an unconstitutional result and simply provides discretionary administrative power to avoid that result. That was precisely the situation which exisited in *Damico* v. *California,* 389 U.S. 416 (1967), *McNeese* v. *Board of Education,* 373 U.S. 668, and *King* v. *Smith, supra,* where there was administrative authority to right the wrong complained of. Indeed it is the situation existing in every

case in which an administrative rule or regulation, which the administrator has the power to change, is attacked on constitutional grounds. See, *King* v. *Smith,* 390 U.S. 309 (1968), *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1947). Whether based on ripeness or mootness, this ruling in essence required exaustion on an action properly brought under §1983, as the court itself seemed to recognize in suggesting mandamus in the state courts (12a).

Ordinarily a three-judge court would not unnecessarily decide a constitutional claim where there is a dispositive statutory claim before it. *Siler* v. *Louisville & Nashville Ry. Co.,* 213 U.S. 174 (1909); *King* v. *Smith, supra; Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960). Nor would it, having heard full argument on the entire case ordinarily remand a pendant statutory claim to the single judge, *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Brotherhood of Locomotive Engineers* v. *Chi., R.I. & Pac. Ry. Co.,* 382 U.S. 423 (1966); *Florida Lime & Avocado Growers* v. *Jacobsen, supra,* though there is some authority for remand of a non-constitutional claim to the initial single district judge, *Hobson* v. *Hansen,* 256 F. Supp. 18 (1966); *Chester* v. *Kinnomon,* 276 F. Supp. 717 (D. Md. 1967); *Londry* v. *Daley,* 288 F. Supp. 194 (N.D. Ill. 1968) (three-judge court, returning issues to single judge).

However that may be, the erroneous dismissal of the constitutional claim and the bifurcation of the case at this late stage had a fundamental distorting effect on the Second Circuit's review of the central question of whether pendant jurisdiction was properly retained over the Social

Security Act claim after remand.* The Court of Appeals recognized that it could not review the validity of the judgment and underlying findings of the three-judge court, since only this Court has jurisdiction to hear an appeal under 28 U.S.C. §1253 from the judgment of a three-judge court in a case actually required to be heard by such a court under 28 U.S.C. §2281. This was such a case before dismissal of the constitutional claim. Compare *Moody* v. *Flowers*, 387 U.S. 97 (1967) and *Idlewild Bon Voyage Liquor* v. *Epstein*, 370 U.S. 713 (1962), with *Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10 (1930) and *Snell* v. *Wyman, supra.* In adhering to these limits on review, the Court of Appeals deemed a determinative claim to be whether pendant jurisdiction was extinguished when the three-judge court dismissed the constitutional claim and declined itself to reach the Social Security Act claim. Indeed, it was suggested that this was implied in the three-judge court's decision to dissolve itself and that this dissolution rendered *King* v. *Smith*, otherwise plainly controlling, inapplicable. This determination, a likely basis for the determinative stay order of the Second Circuit, arises in the context of an appeal in which petitioners cannot even argue the invalidity of any ruling of the three-judge court, including the plainly erroneous predicate that the constitutional claim was itself moot or unripe for lack of exhaustion.

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* Upon the dissolution of the three-judge court, Appellants did not immediately seek highly fragmented review in this Court for obvious reasons. First, the factors compelling the exercise of pendant jurisdiction whether by one judge or three were overwhelming. It seemed inconceivable that either Judge Weinstein or the Second Circuit would permit New York to lower subsistence grants in the face of the federal command, where jurisdictional bases were both clear and established.

Even though the respondents had vigorously sought a three-judge court, they did not dissent from the dissolution of that court.

We recognize the quagmires and multiple confusions stemming from the provisions for one and three-judge courts and the consequent different (and often uncertain) paths to appellate review. But we know of no instance where this structure can lead to the fundamentally unfair result of truncated appellate review predicated on plainly erroneous legal findings, themselves unreviewable. Jurisdictional whipsaw or error compounded may thus be used to avoid *King* v. *Smith* and to avoid adjudication on the merits of a substantial claim on which the rudiments of daily life for 850,000 persons and a profound national interest in federal law and order depend. This is surely not a passive virtue, though it borders on judicial abnegation. In this posture, there is no court in our federal system but this one which can meaningfully perform the function of appellate review over this case.

Even within the limitations on the appellate power of the Second Circuit, the finding that pendant jurisdiction ceased over a federal cause of action upon dismissal of the constitutional claim after submission of all claims for final judgment is profoundly at odds with controlling authority. As *United Mine Workers* v. *Gibbs, supra,* makes clear, the exercise of pendant jurisdiction before or after resolution of the jurisdiction conferring claim is discretionary. Considered in light of the extraordinary commitment of judicial resources, the voluminous materials and extensive record before the Court, the position of the parties seeking a highly-expedited decision and the wholly federal character of the pendant federal cause of action, there is not the slightest doubt that District Judge Weinstein did not abuse his discretion in resolving the 402(a)(23) claim several days after dissolution of the three-judge court. The federal interest itself compelled prompt adjudication.

CONCLUSION

For the reasons stated above, the decision below is both substantial in impact and erroneous, and jurisdiction should be noted.

Respectfully submitted,

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June, 1969